

No. 76-823

Supreme Court, U. S.  
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*In the Supreme Court of the United States*

OCTOBER TERM, 1976

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SPARTAN ELECTRICAL CONSTRUCTION CO., INC.,  
APPELLANT

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,  
ET AL.

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*ON APPEAL FROM THE UNITED STATES DISTRICT  
COURT FOR THE EASTERN DISTRICT OF  
PENNSYLVANIA AND FROM THE UNITED STATES  
COURT OF APPEALS FOR THE THIRD CIRCUIT*

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**MOTION TO DISMISS**

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The Spartan Electrical Construction Company, Inc. (Spartan) is appealing from an order entered by a single-judge district court denying the company's claim that officials of the Environmental Protection Agency (EPA) acted illegally by recommending, without a hearing, that Spartan not be awarded a federally funded construction contract because of Spartan's failure to include a plan for minority hiring (Philadelphia Plan) as required by Executive Order 11246 and applicable regulations.<sup>1</sup>

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<sup>1</sup>Pursuant to the requirements of EPA's construction grant regulations (40 C.F.R. 30.400 *et seq.* (1972 and 1973) and 35.935-6), Executive Order 11246 (30 Fed. Reg. 12319, as amended, 32 Fed. Reg. 14303 and 34 Fed. Reg. 12985), regulations of the Office of Federal Contract Compliance of the Department of Labor (41 C.F.R. Chapter

1. The order of the district court entering judgment for EPA was summarily affirmed by the court of appeals on September 20, 1976 (J.S. 8-9). Any review by this Court is properly by petition for a writ of certiorari to the court of appeals,<sup>2</sup> and the Statement of Jurisdiction filed on December 15, 1976, should be considered as a petition for a writ of certiorari to that court. This Court has jurisdiction under 28 U.S.C. 2103 and 28 U.S.C. 1254(1). The appeal should be dismissed and the petition should be denied.

2. Pursuant to Title II of the Federal Water Pollution Control Act Amendments of 1972, 86 Stat. 833, as amended by 87 Stat. 1069, 33 U.S.C. (Supp. V) 1281 *et seq.*, EPA awarded a grant to the Municipal Authority of the Borough of Morrisville, Pennsylvania (the grantee) for expansion of a waste treatment plant.<sup>3</sup> The grantee published an invitation for bids on a portion of the construction<sup>4</sup> and, in

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60), and provisions of the "Philadelphia Plan" established by the Department of Labor (*Contractors Association of Eastern Pennsylvania v. Secretary of Labor*, 442 F. 2d 159, 162-163 (C.A. 3), certiorari denied, 404 U.S. 854), the grantee of an EPA award must insure that minority hiring goals are incorporated in bids submitted for construction work under the grant.

<sup>2</sup>The case was heard and decided by a single-judge district court and a timely appeal was taken to the court of appeals. No challenge was made to any state statute or practice and no injunction was sought or issued against the enforcement of any state statute. Moreover, the judgment of the district court was entered on November 26, 1975, and the time for docketing an appeal in this Court expired on February 24, 1976.

<sup>3</sup>App. 5a, 12a. Because neither the district court nor the court of appeals entered a written opinion, and because the attachments to appellant's "Statement of Jurisdiction" do not include substantive parts of the record, the federal parties have lodged in this Court a copy of the Appendix prepared in the court of appeals proceedings. Record citations are to this Appendix.

<sup>4</sup>App. 262a.

accordance with EPA regulations,<sup>5</sup> bidders were notified that bid documents must include an affirmative action plan to ensure equal employment opportunity.<sup>6</sup> Although Spartan received bid specifications containing the required Philadelphia Plan forms prior to bid opening,<sup>7</sup> the company submitted a bid which did not include completed forms. Therefore, Spartan was informed by the grantee that its bid, although low, was nonresponsive.<sup>8</sup>

The president of Spartan requested a meeting with EPA officials to discuss the company's bid, but was told by EPA that the agency could not recommend that the contract be awarded to Spartan because of the company's failure to include a Philadelphia Plan with the bid.<sup>9</sup> EPA denied Spartan's subsequent request for a formal hearing.<sup>10</sup>

3. The district court found that "the only reason for the rejection of [Spartan's] bid was the fact that it did not comply with the bid requirements, that is, that it did not have attached thereto an appendix which would indicate the compliance or proposed compliance with the Philadelphia Plan."<sup>11</sup> Judgment was awarded for EPA and summarily affirmed by the court of appeals.

4. Affirmative action plan requirements may be included as covenants in federal assistance grants and

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<sup>5</sup>40 C.F.R. 8.8(a)

<sup>6</sup>App. 262a, 267a.

<sup>7</sup>*Id.* at 119a, 126a.

<sup>8</sup>*Id.* at 99a, 123a-126a.

<sup>9</sup>*Id.* at 134a.

<sup>10</sup>*Id.* at 348a.

<sup>11</sup>*Id.* at 260a.

represent a valid exercise of executive authority; federal agencies may properly refuse to recommend awards to contractors who fail to submit required plans. *Rossetti Contracting Co., Inc. v. Brennan*, 508 F. 2d 1039 (C.A. 7) (Chicago Plan); *Northeast Construction Co. v. Romney*, 485 F. 2d 752 (C.A. D.C.) (Washington Plan); *Contractors Association of Eastern Pennsylvania v. Secretary of Labor*, 442 F. 2d 159 (C.A. 3), certiorari denied, 404 U.S. 854 (Philadelphia Plan). A low bidder who fails to comply with affirmative action requirements may be denied a contract without an administrative hearing. *Commercial Envelope Manufacturing Co. v. Dunlop*, 10 E.P.D. para. 10,252 (S.D. N.Y.). The court below correctly determined that no hearing was required on Spartan's failure to comply with legitimate bid requirements.

For the foregoing reasons, the appeal should be dismissed and, treating it as a petition for a writ of certiorari, the petition should be denied.

Respectfully submitted.

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JANUARY 1977.